



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 26, 2004

Ms. Ruth H. Soucy
Manager and Legal Counsel
Comptroller of Public Accounts
P. O. Box 13528
Austin, Texas 78711-3528

OR2004-2315

Dear Ms. Soucy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 198337.

The Comptroller of Public Accounts (the "comptroller") received two requests from the same requestor for personnel and related records pertaining to the requestor. You state that you have provided the requestor with some responsive information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.107, and 552.117 of the Government Code. We have considered the exception you claim and reviewed the submitted representative samples of information.¹

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. Section 111.006(a)(2) of the Tax Code provides that information "secured, derived, or obtained by the comptroller or the attorney general during the course of an examination of the taxpayer's books, records, papers,

¹We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

officers, or employees, including an examination of the business affairs, operations, source of income, profits, losses, or expenditures of the taxpayer” is confidential. Tax Code § 111.006(a)(2). Some of the submitted information consists of information that was generated by the comptroller and not by the taxpayer. However, it contains information obtained from records filed with the comptroller or obtained during the course of an examination of the taxpayer’s records, officers or employees for purposes of section 111.006(a)(2). That information is confidential under section 111.006 of the Tax Code and must be withheld pursuant to section 552.101 of the Government Code. The comptroller must also withhold the information that identifies taxpayers under section 552.101 in conjunction with section 111.006. *See A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 680 (Tex. 1995); Attorney General Opinion H-223 (1974). We have marked the information accordingly.

Section 552.101 of the Government Code also encompasses the common-law right to privacy. Common-law privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. After reviewing the submitted information, we find that it contains such highly intimate or embarrassing facts that are of no legitimate concern to the public, and thus conclude this information, which we have marked, is protected by common-law privacy and therefore must be withheld under section 552.101 of the Government Code.

Next, section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the

privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.-Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

After reviewing your arguments and the information you seek to withhold under section 552.107, we find that the comptroller has demonstrated that this information constitutes privileged attorney-client communications made in furtherance of the rendition of professional legal services to the client. Accordingly, the comptroller may withhold this information under section 552.107 of the Government Code.

Finally, you argue that portions of the submitted information are excepted under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that such information be kept confidential under section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request is received by the governmental body. *See Open Records Decision No. 530 at 5* (1989). You state that all of the employees whose information is at issue elected confidentiality for their personal information prior to the comptroller's receipt of the present request. Therefore, pursuant to section 552.117(a)(1), the comptroller must withhold the information you have marked.²

²You state that the requestor, in his official work capacity, has seen some of the information at issue. In this regard, we note that mandatory exceptions under the Public Information Act (the "Act"), such as section 552.117, are not waivable. *See Gov't Code § 552.007* (voluntary disclosure of certain information is allowed, unless disclosure is expressly prohibited by law or information is confidential under law); *see also Open Records Decision No. 400* (1983) (prohibition against selective disclosure does not apply when governmental body releases confidential information to the public).

In summary, we conclude the comptroller must withhold the following information: (1) the tax-payer identification information you have marked, as well as the additional information we have marked, under section 552.101 in conjunction with section 111.006 of the Tax Code, (2) the information we have marked under section 552.101 in conjunction with the doctrine of common-law privacy, and (3) the information you have marked under section 552.117 of the Government Code. The comptroller may withhold the information you have marked under section 552.107 of the Government Code. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be

sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Sarah Swanson", with a long, sweeping horizontal line extending to the right.

Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 198337

Enc. Submitted documents

c: Mr. David Tran
1726 Uvalde Street
Mesquite, Texas 75150
(w/o enclosures)